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No. 82-665

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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JAMES SPALDING, *et al.*,
*Petitioners,*

v.

ARTHUR NATHANIEL AIKEN,
*Respondent.*

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTION PRESENTED FOR REVIEW

May a Delayed Habeas Corpus Petition Be Dismissed Where the State Has Not Been "Prejudiced in Its Ability to Respond to the Petition" As Required by 28 U.S.C. § 2254 Rule 9a?

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## COURT RULES INVOLVED

Preliminary Draft of Proposed Rule 9(a) Governing Habeas Corpus Proceedings:

> Rule 9. Delayed or Successive Petitions.
>
> (a) Delayed Petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred. If the petition is filed more than five years after the imposition of sentence, it shall be presumed that there is prejudice to the state.*

Rule 9(a) as transmitted to Congress for approval:

> Rule 9. Delayed or Successive Petitions.
>
> (a) Delayed Petitions. -- A petition may be dismissed if it appears that

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*Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, Proposed Rules Governing Habeas Corpus Proceedings, Proposed Rules Governing §2255 Proceedings for the United States District Courts and Proposed Amendment to the Federal Rules of Appellate Procedure, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Jan., 1973 (U.S. Gov't. Printing Office: 1973 0-490-393) at 73. A copy of this document has been lodged with the Clerk of the Court.

the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred. If the petition is filed more than five years after the judgment of conviction, there shall be a presumption, rebuttal by the petitioner, that there is prejudice to the state. When a petition challenges the validity of an action, such a revocation of probation or parole, which occurs after judgment of conviction, the five-year period as to that action shall start to run at the time the order in the challenged action took place.**

Rule 9(a) as enacted:

> Rule 9. Delayed or Successive Petitions.
>
> (a) Delayed Petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of

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** H.R. Doc. No. 94-464, 94th Cong. 2d. Sess. (1976) (Rules of Procedure, Communication from the Chief Justice of the United States) at 77. A copy of this document has been lodged with the Clerk of the Court.

reasonable diligence before the circumstances prejudicial to the state occurred.***

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*** As amended Sept. 28, 1976 P.L. 94-426, §2(7), (8), 90 Stat. 1335.

## STATEMENT OF THE CASE

Petitioners' statement of the case is inaccurate with respect to its proof of retrial prejudice on remand. See Petition for Certiorari, at 8-9. On remand the case was referred to United States Magistrate John L. Weinberg, whose Report and Recommendation on Motion to Dismiss for Delay are reproduced as Appendix AA, at 1aa - 15aa, to this Brief in Opposition. The Report and Recommendation by the magistrate are of interest for they contain the only existing findings of fact on whether retrial prejudice has been shown.

Following Magistrate Weinberg's Report and Recommendation that the Motion to Dismiss for Delay be denied and that the habeas petition be addressed on its merits, the State of Washington submitted an additional affidavit before the district court to support its position that retrial prejudice existed. The affiant, Jack A. Richey, a prosecutor in the case at trial,

did not mention the alleged loss of trial exhibits as had earlier affidavits which Magistrate Weinberg had found unpersuasive:

> As to the exihbits, there has been no definitive evidence that any have been destroyed. Nor is it clear that the State has exhausted all reasonable avenues of search. Finally, there has been no showing as to the potential significance of the missing exhibits in the event of a retrial.

Report and Recommendation on Motion to Dismiss for Delay, at 6, Respondent's Appendix AA, at 10aa - 11aa.

Thus while it is true, as Petitioners here claim, that the state made a showing of missing trial exhibits, (Petition for Certiorari, at 8 - 9), it is also true that that showing was found insufficient by the referral magistrate -- the only jurist below to make findings of fact on the issue. Compare Report and Recommendation on Motion to Dismiss for Delay, at 6, (Respondent's Appendix AA, at 10aa - 11aa) with Order Granting Respondents' Motion to Dismiss, (Petitioners' Appendix B, at 12a).

Finally, petitioners claim that without several key missing witnesses, the state would not be able to make its case at retrial. Petition for Certiorari, at 8. But petitioners omit any mention of the existence of a complete trial transcript which, coupled with the holding in State v. Ortego, 22 Wash.2d 552, 157 P.2d 320, 159 ALR 1232 (1945), would allow the state to present the prior trial testimony of any truly unavailable witness at any retrial.

REASONS FOR DENYING THE WRIT

Summary of the Argument:

The Court of Appeals correctly interpreted 28 U.S.C. §2254 Rule 9a to exclude retrial prejudice as a sole ground for dismissing a delayed habeas corpus petition. This ruling is totally consistent with the language of Rule 9a. The amendments to that rule by the Judicial Conference clarified the rule to mean what the

Court of Appeals held. There is no prior caselaw holding to the contrary.

The ruling of the Court of Appeals is not in conflict with prior decisions of this Court relating to state court procedural defaults. Respondent first raised the issues in his federal habeas petition in both the state trial and appellate courts. Petitioners did not complain of any state procedural defaults in the federal courts below.

Regardless of this Court's dissatisfaction with delayed federal habeas corpus petitions, this case is an inappropriate vehicle to select for amplifying that dissatisfaction. There has been no fact-finding that the state would be prejudiced at any retrial. Moreover, respondent's prior attorney and not respondent was responsible for the delay.

1. A Delayed Habeas Petition May Not Be Dismissed Solely Upon a Showing of Retrial Prejudice and Without Proof of Prejudice in Responding to the Petition Itself.

The Ninth Circuit Court of Appeals has, in this case, unanimously upheld the right of a federal habeas petitioner to a hearing on the merits of his petition where any delay in filing the petition has in no way prejudiced the state in responding to that petition. The ruling of the Ninth Circuit is consistent with both the language of the Rules Governing Section 2254 Cases and with prior caselaw.

Rule 9(a) of the Rules Governing Section 2254 Cases provides:

> A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

The Ninth Circuit read the foregoing language to specifically define and limit

the prejudice considered by the district court to be prejudice in responding to the petition. Aiken v. Spalding, 684 F.2d 632, 633 (9th Cir. 1982). The circuit court so interpreted Rule 9a because "(t)he phrase 'in its ability to respond to the petition' was an amendment to the Judicial Conference draft of Rule 9(a)." 684 F.2d at 633. History supports this conclusion.

In January, 1973, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States published for comment and suggestion by the bench and bar a preliminary draft of a set of proposed rules to govern the procedures on habeas corpus petitions by state prisoners and on motions under 28 U.S.C.

§2255 by federal prisoners[1]

As preliminarily drafted Rule 9(a) provided in pertinent part:

> (a) Delayed Petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced by delay in its filing unless the petitioner shows that it is based on grounds of which he had no earlier knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred. ...

Preliminary Draft, supra, at 73.[2] The Advisory Committee Notes explained that dismissal could occur if either "... the delay has resulted in the

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[1] Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, Proposed Rules Governing Habeas Corpus Proceedings, Proposed Rules Governing §2255 Proceedings for the United States District Courts and Proposed Amendment to the Federal Rules of Appellate Procedure, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Jan., 1973 (U.S. Gov't Printing Office: 1973 0-490-393) at VII [hereinafter "Preliminary Draft"]. A copy of this document is lodged with the Clerk of the Court.

[2] Rule 9(a) of the §2255 Rules provided similarly. Preliminary Draft, supra, at 116.

state being prejudiced ,"[3] in the case of §2254 or, in the case of §2255, "... if the government has been prejudiced by the delay. ..."[4] The Advisory Committee went on to say with respect to §2255 that "prejudice to the government both in meeting the allegations of the motion and in any possible retrial" were the dual targets of Rule 9(a)'s "flexible, equitable time limitation. ..."[5] It was this early expanded version of the dual targets of Rule 9(a) which the district court relied upon in dismissing the habeas petition below.

The district court's reliance on this early expanded scope of Rule 9(a)'s targets was misplaced, for as the Court of Appeals recognized, a limited version of Rule 9(a) emerged in the 1975 Judicial Conference draft. 684 F.2d at 633. This

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[3] Preliminary Draft, supra, at 74.

[4] Id. at 117.

[5] Id. at 120.

limited version of Rule 9(a) added the language "in its ability to respond to the petition" to Rule 9(a) following the phrase "has been prejudiced."[6] Following the phrase "has been prejudiced" in the §2255 version of Rule 9(a) was added the language "in its ability to respond to the motion."[7] The Advisory Committee Notes were similarly amended to take into account the explicit elimination of one of the two targets of the preliminary draft of Rule 9(a). Following the phrase " and the delay has resulted in the state being prejudice" in the §2254 Notes the language "in its ability to respond to the peition" was added.[8]

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[6] H.R. Doc. No. 94-464, 94th Cong. 2d. Sess. (1976), (Rules of Procedure, Communication from the Chief Justice of the United States) [hereinafter "Communication"] at 77. A copy of this document has been lodged with the Clerk of the Court.

[7] Communication, supra at 98.

[8] Id. at 135.

And in the Notes to the §2255 version of Rule 9(a) following the phrase "if the government has been prejudiced" the phrase "in its ability to respond to the motion" was added.[9] Thus, while the earlier statement of the dual targets of Rule 9(a) of the §2255 Rules remained in the final version of the Advisory Committee Notes sent to Congress,[10] the redrafting of both Rules 9(a) and their advisory comments establish beyond doubt that only one target of Rule 9(a) remains -- prejudice in responding to the pleadings.

Representatives of the academic community, the American Bar Association and even the United States Department of Justice have independently reached the same result as the Court of Appeals:

> From [the] language of [Rule 9(a)] it also appears the fears regarding

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[9] Id. at 158.

[10] Id. at 158.

> the impact that delay might have on the possible retrial of the petitioner should relief be granted have no role in resolving the merits of the laches defense. Rather, the issue is the impact of the delay on the respondent's ability to respond to and defend against the federal post-conviction relief application. Thus, for example, the death of the only eyewitness to the crime for which the petitioner was convicted would be irrelevant if the issues raised by the petitioner's post-conviction application centered around the involuntary nature of his or her confession or guilty plea.

Clinton, Robert N., "Rule 9 of the Habeas Corpus Rules: A Case Study of the Need for Reform of the Rules Enabling Act," 63 Iowa L. Rev. 15, 48 (1977). See also, Id., at 37.

The 1978 commentary to the American Bar Association standards on post conviction remedies clearly recognizes that Rules 9(a) do not furnish a ground for argument that retrial prejudice can form an independent basis for denying consideration of a delayed petition:

> [4] The prejudice recognized by Rule 9(a) is only with respect to the government's ability to respond to the motion. The rule does not expressly contemplate possible prejudice in mounting a renewed prosecution if the collateral attack motion is upheld. It may be possible for the government to respond to the post-conviction claim without serious difficulty, even though the capability of successfully reprosecuting has been impaired.

American Bar Association, Standards for Criminal Justice, Post Conviction Remedies, Commentary to Section 2.4, n.4 (Approved Draft, 1978). (Emphasis added.)

On November 13, 1981, United States Assistant Attorney General Jonathan C. Rose appeared before the Subcommittee on Courts of the Committee on the Judiciary, United States Senate, with respect to S.653. Subdivision 2(e) of S.653 would impose a limitation of three years from final judgment in state courts during which time federal habeas corpus petitions would be timely. Testifying in support of that provision on behalf of the office of Legal Policy of

the Department of Justice, Assistant Attorney General Rose stated the view that Section 2(e) of S.653 was necessary because Rule 9(a) of the Rules Governing §2254 Cases "... does not allow the court to consider the prejudicial effect the petitioner's delay may have had on the possibility of retrial. ..." Hearings on S.653 Before the Subcommittee on Courts of the Senate Committee on the Judiciary, 97th Cong., 1st Sess. Ser. No. J-97-80, at 21 (1982).

Caselaw also supports reading Rule 9(a) prejudice to apply only to answering the petition and not to retrial.

> A United States District Court may dismiss a petition under Rule 9(a) only if the state has somehow been prejudiced in its ability to respond to the petition. ... Since resolution of most of the issues depends primarily on a review of the trial court record, it does not appear that any such prejudice is present.

Hennegan v. Anderson, 500 F.Supp. 641, 643 (E.D. Mich., 1980) (Emphasis added.) See

also Mayola v. Alabama, 623 F.2d 992, 1000 (5th Cir. 1980) and Neal v. Wainwright, 512 F.Supp. 92, 94 n.3 (M.D. Fla. 1981).

The petitioners have pointed to no case and can cite none in which proven retrial prejudice has barred a habeas claim where no prejudice in responding was shown. Indeed, it can be presumed that retrial prejudice was present and yet this Court took action which either upheld granting the writ or reversed its denial in Loper v. Beto, 405 U.S. 473, 474-476 (1972) (22 years between conviction and habeas petition); United States v. Tucker, 404 U.S. 443, 451 (1972) (16 years); Tollett v. Henderson, 411 U.S. 258, 259 (1973) (25 years between conviction and Supreme Court decision, "many years" between conviction and habeas petitions); and Henderson v.

Morgan, 426 U.S. 637 (1976)(5 years).[11]

Thus both the explicit language of Rule 9(a), that the state must be "prejudiced in its ability to respond to the petition ..." (emphasis added), and prior caselaw support reversal of the ruling below.

2. Respondent Has Not Committed and the Court of Appeals Was Not Asked to Rule Upon Any Procedural Default in the State Courts Which Would Bar Consideration of the Merits of His Federal Habeas Corpus Petition.

The ruling of the Ninth Circuit is not inconsistent with prior rulings of this Court. Petitioners for the first time appear to suggest that somehow the ruling below conflicts with this Court's recent

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[11]The weakness of the reasons for granting certiorari are exposed by petitioners' reliance upon a conflict between the ruling below and that in admitted dicta by the district court in Black v. Coombe, 506 F.Supp. 625 (S.D.N.Y. 1981), affirmed without opinion, 672 F.2d 899 (2nd Cir. 1981). See Petition for Certiorari, at 21-22.

decisions in United States v. Frady, ____ U.S. ____, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982) and Engle v. Isaac, ____ U.S. ____, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). Petition, at 11-12. Those cases decided a far different issue than was considered by the Ninth Circuit in this case. Both of those cases construed Wainwright v. Sykes, 433 U.S. 72 (1977), which had ruled that a procedural default in the trial court barred a prisoner from raising a constitutional issue on collateral attack unless he could show cause for and actual prejudice resulting from the default.

Petitioners cite United States v. Frady and Engle v. Isaac, supra, in an apparent attempt to meet the certiorari criteria of Supreme Court Rule 17. However, neither of the cited cases interpreted, or even mentioned, Rule 9(a) of the Rules Governing Section 2254 cases. Moreover, petitioners admit that respondent raised at trial and on direct appeal

all the constitutional issues he relies upon in his habeas corpus action. See Petition for Certiorari, at 3-4, 26-27, 23a, 30a and 35a.

One can only conclude that petitioners seek to ply upon the present Court's dissatisfaction with some applications of the writ. See Engle v. Isaac, supra, ____ U.S. at ____, 71 L.Ed.2d at 799-801. Without disputing that that dissatisfaction may be warranted in some cases, this case would be an especially inappropriate choice through which to further articulate that dissatisfaction.

Here, the Court of Appeals found the delay in filing the habeas petition was "due to an undenied lack of diligence by earlier counsel." Aiken v. Spalding, supra, 684 F.2d at 632.

Here, too, while the Court of Appeals did not further discuss the point, it termed the retrial prejudice claimed by the

state to be only "supposed difficulty" in the face of a contrary district court ruling, itself arrived at without factual findings. Compare Aiken v. Spalding, supra, 684 F.2d at 634, with Petitioner's Appendix A, at 11a - 12a (Order Granting Respondent's Motion to Dismiss).

Since 1945 the law in the State of Washington has been that testimony taken at a prior trial may be admitted at a subsequent trial where the witnesses become unavailable. State v. Ortego, 22 Wash.2d 552, 157 P.2d 320, 159 ALR 1232 (1945). See also, Mancusi v. Stubbs, 408 U.S. 204 (1972). To the extent that the state has met its burden of showing retrial prejudice owing to the present unavailability of any trial witnesses, it has met the requirements of introducing at any retrial of this case the presently available transcripted trial testimony of such witnesses.

## CONCLUSION

The Court of Appeals ruling does not enlarge habeas corpus jurisdiction. Rather, it is fully consistent with the language of §2254 Rule 9(a) and prior caselaw. There is no conflict with this Court's prior rulings. The delay in filing the habeas petition was caused by respondent's prior counsel and not respondent himself. There has been and can be no factually supported conclusion that petitioners here would actually be prejudiced at any re-trial. Accordingly, on the law and on the equities, the petition for certiorari should be denied.

Respectfully submitted,
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Attorneys for Respondent

APPENDIX AA

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

| | | |
|---|---|---|
| ARTHUR AIKEN, | : | |
| | : | |
| Petitioner, | : | Case No. C79-892R |
| | : | |
| -v- | : | REPORT AND RECOM- |
| | : | MENDATION ON |
| JAMES SPALDING, et al | : | MOTION TO DISMISS |
| | : | FOR DELAY |
| Respondents | : | |

INTRODUCTION AND SUMMARY
OF CONCLUSION

Petitioner, an inmate at the Washington State Penitentiary in Walla Walla, was convicted in 1965 of three counts of first degree murder and sentenced to death. His case went through a series of appeals and in June of 1971, the United States Supreme Court reversed the death sentence and remanded for resentencing. On November 28, 1971 petitioner was sentenced in King County Superior Court to three consecutive life terms. He filed this petition for writ of habeas corpus under 28 U.S.C. §2254 approximately eight years later on July 24, 1979.

Briefly summarized, the petition, as amended, challenges the conviction on three grounds:

(1) Law enforcement officers obtained incriminating statements from petitioner, despite his requests to consult an attorney and a statement that he wished to remain silent.

(2) He was denied the opportunity to present fully and fairly to the jury the issue of the voluntariness of his statements.

(3) In light of the substantial publicity surrounding the crimes, the defendants and their trial, the trial court should have: (a) granted a change of venue, and/or (b) allowed defendant additional peremptory juror challenges.

On February 22, 1980, this court dismissed the petition pursuant to Rule 9(a)

of the Rules Governing §2254 Cases in the United States District Courts because petitioner's substantial delay in filing his habeas corpus petition had prejudiced the state. On appeal, however, the Ninth Circuit reversed the dismissal because there was no factual finding that the state was actually prejudiced by the delay. Since the remand, petitioner has amended the petition and has moved to expand the record to include six affidavits and one letter, with enclosures. The case was thereafter referred to the U.S. Magistrate.

On January 7, 1981, this court issued an order directing the parties to file memoranda and affidavits addressing the issue of any prejudice to the state arising from the delayed filing of the petition. The order also noted that the motion to expand the record would be deferred until the court ruled on the Rule 9 motion to dismiss. The parties have since submitted documents to support their respective

positions.

For the reasons set forth below, I recommend the court conclude that respondent has not made an adequate showing of prejudice related to the delay, and that petitioner's delay in filing the petition was neither purposeful nor even attributable to petitioner himself. The motion to dismiss under Rule 9(a) should therefore be denied, and the respondent directed to respond to the amended petition. In addition, I recommend that the Motion to Expand the Record be granted.

ANALYSIS

Rule 9(a) provides:

> Rule 9. Delayed or Successive Petitions.
>
> (a) Delayed Petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

The initial burden is therefore upon respondent to show that it has been prejudiced in responding to the petition by reason of petitioner's delay.

Respondent's showing of prejudice consists of affidavits indicating the following:

(1) The King County Police have current addresses of telephone numbers of only 30 of the 87 witnesses "originally called for trial" in the case.

(2) 138 exhibits were introduced at trial, of which about 104 were admitted. Except for three tape recordings, none of the exhibits has been located, either at the Supreme Court of Washington or at the King County Superior Court. Under customary procedures, the other exhibits might have been destroyed, but there

is no record of whether or when this might have been done.

In addition, respondent's counsel mentions parenthetically, in his unsworn "Response to Order Directing Further Filings," that the whereabouts or availability of the jurors at the original trial is unknown.

Thus there has been no showing whatever that the delay has impaired respondent's ability to address the issues raised by the habeas corpus petition. Respondent has failed to show that the presence of the trial jurors is necessary for responding to the pretrial publicity issue - or, indeed, that those jurors are in fact unavailable if they are needed. Respondent does not even suggest any other respect in which it is prejudiced in responding to the petition.

The thrust of respondent's showing of prejudice is that the state could no longer effectively re-try petitioner if his habeas

corpus petition were successful.

It is not at all clear that prejudice in the ability to re-try a petitioner can form the basis for dismissal under Rule 9(a). The language of the rule seems to require a showing that the delay has prejudiced the state "in its ability to respond to the petition." If prejudice on re-trial is covered by the rule, it is difficult to perceive any function for the quoted language.

The Advisory Committee Notes to Rule 9 of the §2254 Rules shed little light on this question. But Rule 9 of the §2255 Rules is identical in all material respects to Rule 9 of the §2254 Rules; and the Advisory Committee Notes to that rule include:

> "Subdivision (a) provides a flexible, equitable time limitation based on laches to prevent movants from withholding their claims so as to prejudice the government both in meeting the allegations of the motion and in any possible retrial." (emphasis added).

Many cases recite that, under Rule 9(a), a respondent must show it has been prejudiced in its ability to respond to the petition. But the parties have not cited, nor have I located, any case in which respondent could not show prejudice in responding to the petition, but could show prejudice in the event of a retrial. The closest case I have located is Black v. Coombe, 506 F.Supp. 626 (S.D.N.Y. 1981). In that case, the court found that the habeas petition was without merit, but added that Rule 9(a) provided an alternate basis for dismissal since the state would be unable to re-try petitioner after a lapse of twelve years. 506 F.Supp. at 630.

On the other hand, in Lerma v. Estelle, 585 F.2d 1297 (5th Cir. 1978), a dissenting judge stated:

> "Rule 9(a) is directed at prejudice in responding to the petition for the writ, not at the problem of the remedy if the writ is granted."

585 F.2d at 1300, n.3. This question did not seem to be a real issue in the Lerma case, however.

A commentator, writing shortly after enactment of the rules, reached a similar conclusion:

> "... it must appear that the respondent 'has been prejudiced in its ability to respond to the petition by delay in in its filing.' From this language it also appears that fears regarding the impact that delay might have on the possible retrial of the petitioner should relief be granted have no role in resolving the merits of the laches defense. Rather, the issue is the impact of the delay on the respondent's ability to respond to and defend against the federal post-conviction relief application. Thus, for example, the death of the only eye-witness to the crime for which the petitioner was convicted would be irrelevant if the issues raised by the petitioner's post-conviction application centered around the involuntary nature of his or her confession or guilty plea."

Clinton, Robert N. "Rule 9 of the Habeas Corpus Rules: A Case Study on The Need for Reform of the The Rules Enabling Act," 63 Iowa L. Rev. 15, 48 (1977).

Even assuming prejudice on possible

retrial can form the basis for a Rule 9(a) dismissal, I recommend the court conclude the circumstances do not warrant such action here, for three reasons: (a) respondent has not made a particularly strong showing of such prejudice; (b) respondent has not shown any such prejudice is related to petitioner's delay; and (c) petitioner's delay was not purposeful - in fact, he was not responsible for it.

Prejudice on Retrial. Respondent relies upon the availability of trial witnesses and exhibits. As to the witnesses, the only showing is that the King County Police presently have no address or telephone number for many. There has been no showing of any efforts to locate them. Nor, except as to witness Harp, has there been a showing as to the importance of any of the witnesses. As to the exhibits, there has been no definitive evidence that any have been destroyed. Nor is it clear

that the State has exhausted all reasonable avenues of search. Finally, there has been no showing as to the potential significance of the missing exhibits in the event of a retrial.

Prejudice Not Shown To Be Related To Delay. To meet the test of Rule 9(a), respondent must show that it has been prejudiced by delay in the filing of the petition. In Hillery v. Sumner, 496 F.Supp. 632 (E.D.Cal. 1980), the belated habeas petition challenged procedures for grand jury selection. The state was prejudiced in responding because the judge who had selected the grand jury had died in the meantime. But the court denied a motion to dismiss under Rule 9(a) because the judge had died during the lengthy proceedings on direct appeal, and therefore prior to the time petitioner could have filed his federal habeas petition. The court held the prejudice was therefore not due to petitioner's delay in filing his

petition.

Likewise, in this case, there were protracted proceedings on direct appeal, from 1965 through 1971. If in fact witnesses have died or disappeared, or exhibits have been destroyed or lost, there has been no showing whether this occurred in the first six years after petitioner's conviction, or in the ten years which followed.

Petitioner Not Responsible for Delay.

Finally, and perhaps most significantly, petitioner has made a strong showing that the delay in filing his habeas petition was attributable to the dilatory conduct of an attorney, not to any acts or omissions by petitioner himself.

Petitioner was finally sentenced in November 28, 1971. In the Spring of 1973, less than two years after his sentencing, he sought help from Evergreen Legal Services in obtaining further relief. In the Summer of 1973, John Ziegler, who was

then entering his third year of law school, agreed to work on his behalf in preparing a habeas corpus petition. (See affidavit of Ziegler attached to Petitioner's Reply to Response, Docket #48). Ziegler continued to be responsible for filing a petition both after he graduated from law school and went to work for the Prison Legal Services Project, and after he went into private practice in 1975. With the exception of one period during July and August of 1976,[1] petitioner was led to believe that his petition would be filed. (See affidavits of Ziegler and John Hertog, attached to Petitioner's Reply to Response, Docket #48). Ziegler failed to file a

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[1]Petitioner was told by a legal services attorney in July of 1976 that he should seek another attorney. After John Hertog spoke with Ziegler in August, 1976, however, Ziegler agreed to take the case back. This development was relayed to petitioner.

petition, and the case materials, records and transcript were finally returned to petitioner on July 26, 1978. He filed his pro se petition approximately one year later.

Rule 9(a) is based upon the equitable doctrine of laches. Because dismissal under the rule is permissive, not mandatory, the court may use discretion in assessing the equities of the particular situation. Advisory Committee Note to Rule 9, §2254 Rules.

The equities on this motion to dismiss weigh heavily in favor of petitioner. In the absence of an overwhelming showing of prejudice by the state, the dilatory conduct of petitioner's attorney should not foreclose an evaluation on the merits of his constitutional challenges to a trial which resulted in three consecutive life sentences. The state has not made a strong showing that it has been prejudiced in any respect by reason of the delay.

Petitioner's claims should therefore stand or fall on their merits.

If the court adopts the recommendation that the petition be addressed on the merits, then the Motion to Expand the Record should also be granted. The material petitioner seeks to include is relevant to the issues raised by petitioner, and respondent has not challenged the motion.

A proposed form of order accompanies this Report and Recommendation.

DATED this 16 day of June, 1981.

/s/
John L. Weinberg
United States Magistrate